No. 14680

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEXAS INDEPENDENT OIL CO., INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEOPHIL C. KAMMHOLZ,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
SAMUEL M. SINGER,
JAMES A. RYAN,
Attorneys,
National Labor Relations Board.

INDEX

	Page
Jurisdiction	1
Statement of the case	2
I. The Board's findings of fact	2
A. Respondent's interrogation of job applicants as to their union affiliation and sympathies	2
B. The discriminatory discharges	3
1. Kenneth Van Horn	3
2. John Cox	4
3. E. W. Richins, Jr	6
4. Harry Almada	7
C. Respondent's further interference, restraint, and coercion	11
II. The Board's conclusions of law	11
III. The Board's order	12
Argument	13
I. Substantial evidence on the record considered as a whole supports the Board's finding that respondent discriminatorily discharged employees Van Horn, Cox, Richins, and Almada, in violation of Section 8 (a) (1) and (3) of the Act	13
II. Substantial evidence on the record considered as a whole supports the Board's finding that respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act	18
Conclusion	20
Appendix	21

AUTHORITIES CITED

Cases:

Birmingham Post Co. v. *N. L. R. B.*, 140 F. 2d 638 (C. A. 5)	20
Blue Flash Express, Inc., 109 NLRB No. 85, 34 LRRM 1384	19
N. L. R. B. v. *Akin Products Co.*, 209 F. 2d 109 (C. A. 5)	12
N. L. R. B. v. *Anderson*, 206 F. 2d 409 (C. A. 9), certiorari denied, 346 U. S. 938	18
N. L. R. B. v. *The Blanton Co.*, 121 F. 2d 564 (C. A. 8)	17
N. L. R. B. v. *Chautauqua Hardware Co.*, 192 F. 2d 492 (C. A. 2)	19
N. L. R. B. v. *Dant*, 207 F. 2d 165 (C. A. 9)	14, 15
N. L. R. B. v. *Geigy Co., Inc.*, 211 F. 2d 553 (C. A. 9), certiorari denied, 348 U. S. 821	20
N. L. R. B. v. *General Shoe Corp.*, 192 F. 2d 504 (C. A. 6), certiorari denied, 343 U. S. 904	18
N. L. R. B. v. *Geraldine Novelty Co., Inc.*, 173 F. 2d 14 (C. A. 2)	15
N. L. R. B. v. *Kropp-Forge Co.*, 178 F. 2d 822 (C. A. 7), certiorari denied, 340 U. S. 810	19

Cases—Continued Page
N. L. R. B. v. *W. C. Nabors*, 196 F. 2d 272 (C. A. 5), certiorari denied, 344 U. S. 865 ---- 15
N. L. R. B. v. *Radcliffe*, 211 F. 2d 309 (C. A. 9), certiorari denied, 348 U. S. 833 ---- 18
N. L. R. B. v. *Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730 (C. A. 9), certiorari denied, 346 U. S. 937 ---- 18
N. L. R. B. v. *Schaefer-Hitchcock Co.*, 131 F. 2d 1004 (C. A. 9) ---- 20
N. L. R. B. v. *Shedd-Brown Mfg. Co.*, 213 F. 2d 163 (C. A. 7) ---- 15
N. L. R. B. v. *State Center Warehouse*, 193 F. 2d 156 (C. A. 9) ---- 14
N. L. R. B. v. *Syracuse Color Press, Inc.*, 209 F. 2d 596 (C. A. 2), certiorari denied, 347 U. S. 966 ---- 19
N. L. R. B. v. *Waterfront Employers of Washington*, 211 F. 2d 946 (C. A. 9) ---- 12
N. L. R. B. v. *West Coast Casket Co.*, 205 F. 2d 902 (C. A. 9) ---- 18
N. L. R. B. v. *Whitin Machine Works*, 204 F. 2d 883 (C. A. 1) ---- 18
Sax v. *N. L. R. B.*, 171 F. 2d 769 (C. A. 7) ---- 19
Texarkana Bus Co. v. *N. L. R. B.*, 119 F. 2d 480 (C. A. 8) ---- 18
Union News Co., 112 NLRB No. 57, 36 LRRM 1045 ---- 19
Wells, Inc. v. *N. L. R. B.*, 162 F. 2d 457 (C. A. 9) ---- 17

Statutes:
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. S., Section 151, *et seq.*) ---- 1
Section 2 (13) ---- 20
Section 7 ---- 2
Section 8 (a) (1) ---- 2, 13, 18
Section 8 (a) (3) ---- 2, 13
Section 10 ---- 1
Section 10 (e) ---- 1

In the United States Court of Appeals for the Ninth Circuit

No. 14680

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEXAS INDEPENDENT OIL CO., INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Section 151, *et seq.*),[1] for the enforcement of its order issued against respondent on April 30, 1954, following proceedings under Section 10 of the Act. The Board's decision and order (R. 97–105)[2] are reported at 108 N. L. R. B. No. 100. This Court has jurisdiction of the proceed-

[1] The relevant provisions of the Act are printed in Appendix, *infra*, pp. 21–23.

[2] References designated "R" are to the pages of the printed record. Whenever, in a series of references a semicolon appears, the references preceding the semicolon are to the Board's findings, and those following are to the supporting evidence.

ing under Section 10 (e) of the Act, the unfair labor practices having occurred within this judicial circuit at Phoenix, Arizona.[3]

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondent violated Section 8 (a) (1) and (3) of the Act by its discriminatory discharge of employees Van Horn, Cox, Richins, and Almada. The Board also found that respondent, in violation of Section 8 (a) (1) of the Act, interrogated its employees as to their union activities and otherwise coerced and restrained them in the exercise of rights guaranteed to them by Section 7 of the Act. The findings and supporting evidence are detailed below.

A. Respondent's interrogation of job applicants as to their union affiliation and sympathies

In April 1953, respondent discontinued its practice of importing petroleum products from refineries by railroad or contract carriers and, instead, set up its own trucking system (R. 25; 238). Respondent's new system of operations necessitated the hiring of truck drivers, a function which it delegated to its manager, M. A. Quisenberry (R. 26; 238). Quisenberry admitted at the hearing before the Board that he had interrogated prospective employees about their past and present union affiliations and had told them that he did not want the job organized as a union

[3] Respondent, an Arizona corporation, is engaged in the transportation and sale of gasoline and petroleum products. It is admitted that respondent is engaged in interstate commerce and no jurisdictional question is here presented (R. 24–25; 117).

job until the operation of the truck route had become firmly established. Quisenberry also acknowledged that he had urged the employees to refrain from union activities (R. 26–27; 241, 253, 258, 262).

The employees first evinced interest in union activities at the plant early in May 1953 (R. 29; 192). On May 15, 1953, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (hereafter referred to as the Union), filed with the Board a petition to hold an election to determine the employees' choice of bargaining representative (R. 38; 140).[4]

B. The discriminatory discharges

1. *Kenneth Van Horn*

Van Horn was hired by respondent as a truck driver on May 2, 1953 (R. 28; 189). When he was interviewed for the job, Company Manager Quisenberry, asked him if he was a union member (R. 28; 193). Van Horn replied in the affirmative, stating that he was on a withdrawal card from a local union in Long Beach, California (R. 28; 193).

On May 12, Quisenberry approached Van Horn while he was waiting for his truck at 84 Truck Shop in Tucson (R. 28, 29; 189–190). Quisenberry asked Van Horn to identify the man with whom he had talked on the previous day at Phoenix (R. 29; 191). When Van Horn appeared surprised, Quisenberry explained to Van Horn that while he was unloading gasoline at Blakely No. 1, he (Van Horn) had told

[4] The records of the Board disclose that the Union withdrew the petition on October 30, 1953, and no election was held.

an elderly man about the Union's organizational activities; that this man had in turn informed Steele, respondent's vice president, that Van Horn was investigating the Union among the drivers, and that as a result Steele had ordered Quisenberry to discharge Van Horn (R. 29; 191–192). Van Horn admitted to Quisenberry that he had talked to the man but stated he had simply told him that there "was talk about passing out blanks" and organizing a union sometime in the future (R. 29; 192). Van Horn denied that he had attempted to "instigate the union" and remarked to Quisenberry that he was giving him a "chicken deal." Despite Van Horn's explanation and protest, Quisenberry gave him his severance check which had already been prepared (R. 29–30; 192, 193). Later in the day Quisenberry admitted to Van Horn that he had given him a "chicken deal" but told Van Horn that his hands were tied and that he could do nothing about the matter (R. 30; 194).[5]

2. John Cox

Cox commenced his duties as a truck driver for respondent on April 15 (R. 31; 178). At the time he made application for the job, Quisenberry asked both Cox and Jensen, another applicant, if they were union members (R. 31; 179). Cox replied that he was not a union member, while Jensen stated that

[5] Van Horn was rehired by respondent on September 28 (R. 30; 195). At that time Quisenberry remarked, "I am not going to tell any man how to vote but I still want it nonunion" (R. 30; 196). When Van Horn asked Quisenberry if he would get his seniority standing, he replied that he would provided he went nonunion (R. 30; 198).

both he and Cox had been union members but were delinquent (R. 31; 179).

About May 1, as Cox was getting his load papers from Quisenberry, the latter asked him if he was keeping his union book paid up (R. 32; 180). Cox replied that he was, whereupon Quisenberry questioned him as to how he would vote if an election were held (R. 32; 180). Cox stated that he was undecided as to how he would vote (R. 32; 180). Cox gave a similar answer a few days later when Quisenberry asked him again to declare his intentions (R. 32; 180).

On May 15, after completing his run to Phoenix, Cox called Quisenberry for further instructions (R. 32; 181). Quisenberry requested Cox to report to him at his home (R. 32; 181). At this meeting Quisenberry again asked Cox how he would vote in the event an election were conducted (R. 32; 181). After listening to Cox's reply that he was still undecided, Quisenberry informed Cox that he was being discharged for driving in excess of 55 miles an hour, the established speed limit (R. 32; 182). Quisenberry admitted at the hearing that he also asked Cox if he was still keeping up his union book and that Cox replied that he was doing so (R. 258).

A few days after Cox was discharged, Quisenberry told employees Almada and Richins, who were later to be discharged, that he had fired Cox because he had lied about his union membership and that he had hired Cox and granted him a loan on the assurance from Cox that he was not a union member (R. 34–35; 134–135). Quisenberry also told the two

employees that Cox would have caused him "trouble" later (R. 35; 135).[6]

3. E. W. Richins, Jr.

Richins was hired by respondent as a truck driver on April 28 (R. 38; 158). When Richins called Quisenberry to inquire about the job the latter asked Richins about his union standing to which Richins replied that he had a withdrawal card since 1946 (R. 38; 159). Later at the interview Richins asked Quisenberry why he had shown an interest in his union status (R. 38–39; 159). Quisenberry replied that he was looking for a non-union crew but that in view of Richins' long period of inactivity in the Union he did not believe Richins would cause him worry (R. 39; 159). Quisenberry then promised Richins the next truck into Lordsburg and stated that he paid better than union scale in order to keep the job non-union (R. 39; 159).

On May 22, Quisenberry happened to meet Richins and employee Almada in front of the latter's home in Lordsburg (R. 39; 160). Quisenberry remarked that although he knew that such an inquiry constituted an unfair labor practice he wanted to ask Richins and Almada how they were going to vote in the election (R. 39; 160). Richins, who was reluctant to jeopardize either his withdrawal card or his job, replied, "I couldn't cut my nose off to spite my face" (R. 39; 161). Almada replied that although he would

[6] On cross-examination Cox testified that he was a union member at the time he was hired and that he lied to Quisenberry in order to obtain the job (R. 33–34; 185).

not instigate any union activity he was for the union and would vote accordingly (R. 39; 138, 161).

On May 25, Richins went to the Dixie Drive Cafe in Lordsburg where he ordinarily commenced his run (R. 40; 162). When he arrived there Richins observed that there were three trucks as well as three drivers (R. 40; 162). One of the drivers asked Richins which truck he was going to take (R. 40; 162). Richins replied, "It looks like I am not going to take" (R. 40; 162). Quisenberry, who was present, then remarked, "They had put the pressure on [me] in Phoenix" and went on to tell Richins that he was being discharged for manhandling the gears on his truck (R. 40; 162, 163).

A short time after Richins was discharged Quisenberry remarked to employees Almada and Beeson that he had been reluctant to discharge Richins, for he was "a good fellow," but that he had done so because Richins' cousin was encouraging him on the Union and that Richins would vote against respondent in the election (R. 42–43; 133). Quisenberry made a similar remark again to Almada a few days later (R. 43; 134).

4. *Harry Almada*

Almada worked as a truck driver for respondent from the date of his hire, April 13, until he was discharged on June 3 (R. 45; 121, 125). Two days before Almada was hired, Quisenberry went to his home and asked him if he was looking for employment as respondent was starting a new trucking operation between Lordsburg and El Paso (R. 45; 122).

When Almada indicated that he was interested in a job, Quisenberry asked him if he was a union member (R. 45; 123). Almada replied that he had a union book and was in good standing (R. 45; 123). Upon hearing this, Quisenberry said, "Well, that lets you out, because I am not hiring any union men. I am hiring all non-union men because I don't want a union outfit. I don't want no trouble with the Union and I don't want to be hampered or delayed in any way by the union" (R. 45; 123). Quisenberry then told Almada that if he would drop his union book and withdraw from the Union he would hire him (R. 46; 123). Almada agreed to comply with this request and upon Quisenberry's insistence promised not to instigate any union activities or to do anything which would cause "trouble" between the Union and respondent (R. 46; 124).

When Almada reported on the job April 13, Quisenberry told him that he would ride as far as El Paso in order to give Almada a "test hop" (R. 46; 125). During the "test hop" Quisenberry remarked that he was at one time a union member but that he did not begin to improve his lot until he worked without the union (R. 46; 125). Quisenberry then went on to say that Almada's job would also be a "good deal" if there was no union interference (R. 46; 125). The two men then discussed the 55 mile per hour speed limit and respondent's policy that tires should be "bumped"[7] at approximately 60–70 mile intervals

[7] A process by which all the dual tires on the truck are kicked or hit with a tool to make certain they are properly inflated (R. 46; 146).

(R. 46–47; 126, 242). Quisenberry told Almada that he was the only person who read the tachograph charts showing the speed of the trucks and that the charts could be disregarded if it was necessary to reach the El Paso refinery before it closed (R. 47; 128, 129).

Almada was an experienced truck driver and Quisenberry had a high regard for his ability (R. 47; 246, 274). Quisenberry at one time offered Almada a supervisory position and at various times hired employees whom Almada referred to him (R. 47; 131, 246).

About the middle of May, Quisenberry called Almada and informed him that he was "in a terrible spot" as Steele, respondent's vice president, had ordered Almada's discharge because he was "union all the way through" (R. 48; 135). Quisenberry then told Almada to send his withdrawal card back to Fred Bone, the union representative, and to tell Bone that he wanted no part of the Union (R. 48; 136). When Almada appeared reluctant to do this, Quisenberry remarked "Well, by George, there is nothing else you can do. It is either that or else" (R. 48; 136). Almada then explained to Quisenberry that he had kept his word and had not caused any union activity but Quisenberry retorted that Bone had described Almada as a staunch Union supporter, "ready" to "follow whatever the Union told [him] to do" (R. 48; 136). When Almada later questioned Bone about his conversation with Quisenberry, Bone denied that he had ever talked with him (R. 48; 136). Almada called

Quisenberry and told him of Bone's denial, whereupon Quisenberry remarked, "Well, I am sorry, but I have to do something to tie my men in one side of the fence or the other" (R. 48–49; 136). Almada then explained to Quisenberry that he could not lose his withdrawal card as he might need it in the future (R. 49; 136). Quisenberry replied, "Either that, or else" (R. 49; 136). When Almada remarked that Quisenberry should do whatever he thought was right, the latter told Almada that he would confer with Steele on the matter and inform Almada of the result, but that in the meantime he should not take his usual run (R. 49; 137). Almada, however, did make his run as his "breaking partner" informed him later that everything had been fixed up (R. 49; 137).

About 11 p. m. on June 2, Almada went to the Dixie Truck Stop at Lordsburg to fuel his truck (R. 49; 141, 142). He was delayed at the pumps almost two hours because three other trucks were being serviced (R. 49; 142). With the delay, Almada was worried that he would not make the schedule so he attempted to make up lost time (R. 49; 142). Almada had reached a point between Deming and Las Cruces when he noticed that something was wrong (R. 49; 148). Upon discovering that one of the tires was flat and burning, Almada went for his fire extinguishers but found them dead (R. 49; 143). With the assistance of other drivers, Almada removed the tire leaving it in the desert to cool and then continued on his run (R. 49–50; 143). On the return trip Almada picked up the tire and cradled it back on the trailer (R. 50;

143). Later that day Almada reported the incident to Quisenberry (R. 50; 143). About midnight Quisenberry called Almada again and advised him that he was being replaced by George Wallsmith as he could not have the employees burning tires up and down the road (R. 50; 143). Wallsmith was not a union member and admitted at the hearing that he had burned tires on at least two occasions during his career as truck driver and was not discharged therefor (R. 100; 310, 311).

C. Respondent's further interference, restraint, and coercion

During this same period in May and early June, Company Manager Quisenberry asked employee Bailey at the time he was hired if he was a union member and then instructed him to note on his employment application that he was, in fact, a member (R. 52; 212, 213). Quisenberry had obtained a supply of these application forms at a Tucson stationery store and under the section "Activities other than religious" requested applicants to note their union affiliation (R. 55; 239). Quisenberry also asked employees Turner and Johnson about their union membership when they were interviewed, and later advised Johnson to drop his union book (R. 58, 35; 157, 218, 219).

II. The Board's conclusions of law

Upon the foregoing facts, the Board concluded that respondent had discharged employees Van Horn, Cox, Richins, and Almada because of their union sympathies and activities and not for the reasons ad-

vanced by respondent (*infra,* pp. 15–17), thereby violating Section 8 (a) (3) and (1) of the Act (R. 85, 98).[8] The Board also concluded that Quisenberry's interrogation of employees as to their union activities, his urging of employees to refrain from such activities, and his placing in effect a hiring plan to keep the employees from engaging in union activities constituted interference, restraint and coercion violative of Section 8 (a) (1) of the Act (R. 64–69).

III. The Board's order

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act (R. 102, 103). Affirmatively, the Board ordered respondent to reinstate employees Van Horn, Cox, Richins, and Almada with back pay and to post the usual notices (R.103–104).

---

[8] The Trial Examiner, although noting that Quisenberry's conduct "gives rise to the strongest kind of inference" that Almada's discharge was discriminatorily motivated, nevertheless concluded that he was discharged for cause, namely, for burning the tire on his truck (R. 82, 83). In reversing the Examiner's conclusion, the Board accepted all of his credibility determinations but drew different inferences from the facts found (R. 98–100). The "final obligation to determine the facts as to the matters at issue here rests with it [the Board], and * * * in all cases where examiner and Board differ, the Board's findings [if] supported by evidence * * * should be sustained" *NLRB* v. *Akin Products Co.*, 209 F. 2d 109, 111 (C. A. 5). See also *NLRB* v. *Waterfront Employers of Washington*, 211 F. 2d 946, 953 (C. A. 9).

ARGUMENT

I. Substantial evidence on the record considered as a whole supports the Board's finding that respondent discriminatorily discharged employees Van Horn, Cox, Richins, and Almada, in violation of Section 8 (a) (1) and (3) of the Act

The evidence summarized above fully supports the Board's finding that the discharges of Van Horn, Cox, Richins, and Almada were discriminatorily motivated. Indeed, the admissions of Company Manager Quisenberry that the employees' union sympathies motivated the discharges, without more, support that conclusion.

Thus Quisenberry admitted to Van Horn that Vice President Steele had ordered his dismissal after learning that he was instigating the Union among the drivers. Quisenberry conceded that he had given Van Horn a "chicken deal," explaining that his hands were tied and that he could do nothing about it (*supra,* p. 4). Quisenberry also admitted to two employees that Cox was released because at the time he was hired he represented himself as a non-union employee while, as a matter of fact, he was a union member in good standing (*supra,* pp. 4–5). He acknowledged that although he was reluctant to dismiss Richins (whom he characterized as "a good fellow"), he had to get rid of him because of his union ideas and because he thought Richins would vote against the Company in the forthcoming Board election (*supra,* p. 7). Finally, Quisenberry informed Almada that Vice President Steele ordered his discharge because he was "union all the way through." Quisenberry made it clear that Almada would have

to turn in his union card and resign from the Union "or else" face dismissal (*supra*, pp. 9, 10).[9]

Respondent's motive for punishing these employees is not difficult to discern. Company Manager Quisenberry, who hired and fired the employees, admittedly opposed the unionization of the plant. He interrogated job applicants as to their past and current union affiliations, directed employees to refrain from union activities, and urged them to repudiate the Union. As the Trial Examiner stated (R. 64–65): "In practically all hiring Quisenberry * * * left the strong inference in the minds of the employees that their employment resulted from the fact that they were either not in good standing in the Union, or not inclined to promote union activities on the job and that their chances of continued employment would be seriously affected by their engaging in union activities."

The targets of Quisenberry's questioning included all of the four employees involved in this proceeding. All four were interrogated as to their union standing at the time of their employment. One of them, Almada, formerly a leading union man (R. 46, 81–82; 123), was hired on the express condition that he drop his union card, resign from the Union, and refrain from any union activity (*supra*, p. 8). After

[9] The foregoing findings of the Trial Examiner, which were adopted by the Board, are based on the testimony of employees. Quisenberry either categorically denied or could not recall the statements attributed to him. "For obvious reasons, questions of credibility were for the Examiner." *N. L. R. B.* v. *State Center Warehouse*, 193 F. 2d 156, 157 (C. A. 9); *N. L. R. B.* v. *Dant*, 207 F. 2d 165, 167 (C. A. 9).

their employment, Almada, Cox and Richins were queried as to their voting intentions. Richins was informed that he would be paid better than the union scale in order to keep the job non-union and Almada was assured that his job would be a "good deal" if there was no union interference (*supra,* pp. 6, 8).

The timing of the discharges is also significant. Van Horn's discharge took place within one day after respondent learned of his union activity (*supra,* p. 3). Cox was discharged after refusing to disclose to Quisenberry his voting intention, Richins after revealing his intention to vote for the Union, and Almada after rejecting Quisenberry's request to resign from the Union. Surely, "the coincidence in time * * * would seem somewhat significant" (*N. L. R. B.* v. *Geraldine Novelty Company, Inc.,* 173 F. 2d 14, 18 (C. A. 2)).[10]

The Board's conclusion that the discharges were discriminatorily motivated is fortified by the fact that the reasons advanced for the dismissals do not stand under scrutiny. *N. L. R. B.* v. *Dant,* 207 F. 2d 165, 167 (C. A. 9). Respondent contends that Van Horn was fired for habitual tardiness. Yet Quisenberry rehired him four months later, an action which, as the

[10] The Board's inference of discrimination is not rebutted by the fact that respondent did not discharge other union adherents. "The fact that respondent retained some union employees does not exculpate him from the charge of discrimination as to those discharged." *N. L. R. B.* v. *W. C. Nabors,* 196 F. 2d 272, 276 (C. A. 5), certiorari denied, 344 U. S. 865 and cases there cited. "* * * discouragement may be effected by making 'an example' of some of them." *N. L. R. B.* v. *Shedd-Brown Mfg. Co.,* 213 F. 2d 163, 174–175 (C. A. 7).

Board stated (R. 71), is inconsistent with Quisenberry's claim that Van Horn was so undependable that his employment could not be continued. Respondent contends that Cox was discharged for driving in excess of the Company's speed limit of 55 miles per hour. However, as the Board observed (R. 73), the fact is that "the Company's speed limit was more honored in the breach than in the observance by the drivers." Quisenberry had repeatedly told the employees that it was important for the drivers to return to the refinery on time, even if to do so entailed violation of the speed limit (R. 73; 128–129, 257).

As to Richins, respondent claims that his discharge was occasioned by transmission failure in his truck. However, the record shows that with respect to this particular truck, these failures not only preceded his handling of the truck but continued after his discharge (R. 78–79; 254, 278, 279). That the defect was not caused by Richins' alleged manhandling of the gears is established by the fact that the gear ratio originally installed in the truck was found unsuitable to the heavy duty which the truck was required to perform and had to be replaced with a lower gear ratio after Richins' discharge (R. 79; 278). Moreover, two drivers, in addition to Richins, had handled the same truck and Quisenberry's sole basis for the conclusion that Richins was at fault was the fact that Richins was the least experienced of the three (R. 80; 280–281).

Finally, respondent contends that Almada was fired because he failed to "bump" his tires for about 80 miles (R. 100), and as a result burned up a tire on the road. However, as the Board pointed out

(R. 160; 22), "although it was agreed that the better practice was to bump tires every 60 or 70 miles, Almada's practice conformed to a set of rules issued over Quisenberry's signature, stating in part: 'Drivers will bump tires at least every 80 miles. * * *' " No actual damage other than to the tire resulted (R. 100; 243). Moreover, Almada was replaced by a driver who was not a union member and who testified that he had burned tires on at least two occasions during his career as a truck driver and was not discharged therefor (R. 100; 311). Under all the circumstances surrounding the discharge, the Board reasonably inferred (R. 101–102) that "the burning of the tire was a mere pretext which the Respondent seized upon in an attempt to conceal its unlawful motive."

For all of the foregoing reasons the Board properly rejected respondent's contention that the employees in question were discharged for cause. As in *N. L. R. B.* v. *The Blanton Co.,* 121 F. 2d 564, 570 (C. A. 8), "the reasons urged [for the discharges] * * * would have had more persuasive force if the employer's displeasure at their union activity had not been specifically expressed to each of them." Moreover, even if it is assumed, as respondent contends, that it had ample grounds for discharging the employees, the Board was justified in concluding that none of the Company's given reasons was *the actual ground* for the dismissal. "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *Wells, Inc.* v. *N. L. R. B.,* 162 F. 2d 457, 460 (C. A. 9). See also *N. L. R. B.* v.

L. Rooney & Sons Furniture Mfg. Co., 206 F. 2d 730, 737 (C. A. 9), certiorari denied, 346 U. S. 937; *N. L. R. B.* v. *Whitin Machine Works,* 204 F. 2d 883, 885 (C. A. 1).

II. Substantial evidence on the record considered as a whole supports the Board's finding that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act

The record establishes that respondent employed application forms requiring applicants for jobs to disclose their union affiliations, questioned the applicants concerning their union standing, told employees that respondent hired only non-union men and paid higher wages to keep the job non-union, encouraged employees to withdraw from the Union, interrogated them concerning their voting intentions, exacted a promise from an employee not to instigate any union activities, instructed another to stop paying union dues, and told employees that the Company had fired an employee because he had concealed his union sympathies and membership. Settled judicial authority establishes that such conduct constitutes interference, restraint, and coercion in violation of Section 8 (a) (1) of the Act. See *N. L. R. B.* v. *Anderson,* 206 F. 2d 409 (C. A. 9), cert. den. 346 U. S. 938; *N. L. R. B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 904 (C. A. 9); *N. L. R. B.* v. *Radcliffe,* 211 F. 2d 309, 314, 316 (C. A. 9), cert. den. 348 U. S. 833; *N. L. R. B.* v. *General Shoe Corp.,* 207 F. 2d 598 (C. A. 6); *Texarkana Bus Co.* v. *N. L. R. B.,* 119 F. 2d 480, 482–483 (C. A. 8).

Contrary to respondent's contention the interrogation in this case does not come within the rule that

"mere words of interrogation * * * by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism * * * cannot, standing naked and alone, support a finding of a violation of Section 8 (a) (1)." *Sax* v. *N. L. R. B.* 171 F. 2d 769, 773 (C. A. 7). Here, the interrogation was conducted by an admittedly anti-union manager, who repeatedly urged employees to repudiate the Union, and openly suggested that their jobs depended on abstention from union activities. Moreover, the interrogation was followed by the discriminatory discharge of four employees. Cf. *N. L. R. B.* v. *Chautauqua Hardware Co.,* 192 F. 2d 492, 494 (C. A. 2). See also *N. L. R. B.* v. *Syracuse Color Press, Inc.,* 209 F. 2d 596, 599 (C. A. 2), cert. den. 347 U. S. 966; *N. L. R. B.* v. *Kropp Forge Co.,* 178 F. 2d 822, 827–828 (C. A. 7), cert. den. 340 U. S. 810; *Union News Co.,* 112 N. L. R. B. No. 57, 36 L. R. R. M. 1045, 1046, distinguishing *Blue Flash Express, Inc.,* 109 N. L. R. B. No. 85, 34 L. R. R. M. 1384, relied on by respondent.

Respondent's further contention that it could not be held responsible for Quisenberry's acts because he acted without authorization and because respondent subsequently ordered him to cease his interrogations, is without merit. Quisenberry was a high-ranking management representative who hired and fired employees and supervised their operations. "The law is well settled that under circumstances like those shown here, an employer is accountable for unfair practices resulting from the activities of his supervisory employees not only when the proof shows

direct authorization but whenever circumstances are such that the employees would have just cause to believe that the supervisors were acting for and on behalf of the management." *Birmingham Post Co.* v. *N. L. R. B.*, 140 F. 2d 638, 640 (C. A. 5). See also *N. L. R. B.* v. *Geigy Co., Inc.*, 211 F. 2d 553, 557 (C. A. 9), cert. den. 348 U. S. 821, and cases cited therein; *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 131 F. 2d 1004, 1007 (C. A. 9). Moreover, the Act specifically provides in Section 2 (13) that "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Accordingly, the Board properly concluded that respondent, independently of its violations of Section 8 (a) (3), violated Section 8 (a) (1) of the Act.

CONCLUSION

For the reasons stated above, the Board's order should be enforced in full.

Respectfully submitted.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
SAMUEL M. SINGER,
JAMES A. RYAN,
Attorneys,
National Labor Relations Board.

MAY 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own chosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *.

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employed to encourage or discourage membership in any labor organization: * * *.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as herein provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *.

(c) * * * If upon the preponderence of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent,

or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1955